

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

GERALDO OJITO,

Petitioner,

v.

KEN CLARK, Warden,

Respondent.

Case No. 09-CV-2127-LAB (JMA)

**REPORT AND RECOMMENDATION
RE DENYING PETITION FOR WRIT OF
HABEAS CORPUS**

I. Introduction

Petitioner Geraldo Ojito ("Ojito" or "Petitioner") is a California state prisoner proceeding *pro se* with a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. He was convicted by a jury in San Diego County Superior Court, consolidated case numbers SCD 169899 / SCD 174154, of two counts of second degree murder (Cal. Penal Code § 187(a)). (Lodgment No. 8, Clerk's Transcript ("CT") at 285-93.)¹ Petitioner asserts the trial court violated his due process rights by admitting the following into evidence: (1) photographs of Petitioner brandishing guns, (2) evidence that Petitioner possessed an inoperable firearm when he was arrested, (3) violent lyrics

¹The jury also convicted Petitioner on four counts of premeditated attempted murder, one count of mayhem, and one count of shooting into an occupied vehicle. These convictions were reversed on appeal. People v. Ojito, No. D049765, slip op. (Cal. Ct. App. Aug. 18, 2008) [(Lodgment No. 4)].

1 adopted by Petitioner from other music, and (4) gang evidence. Petitioner contends
 2 that the cumulative impact of this evidence deprived him of his Fourteenth Amendment
 3 right to a fundamentally fair trial. (Pet. at 6.)

4 The Court has considered the Petition, Respondent's Answer and Memorandum
 5 of Points and Authorities in support thereof, Petitioner's Traverse, and all the supporting
 6 documents submitted by the parties. Based upon the documents and evidence
 7 presented in this case, and for the reasons set forth below, the Court recommends that
 8 the Petition be **DENIED**.

9 **II. Factual Background**

10 The following statement of facts is taken from the California Court of Appeal
 11 opinion, People v. Ojito, No. D049765, slip op. (Cal. Ct. App. Aug. 18, 2008).
 12 (Lodgment No. 4.) This Court gives deference to state court findings of fact and
 13 presumes them to be correct. Tilcock v. Budge, 538 F.3d 1138, 1141 (9th Cir. 2008).
 14 Petitioner may rebut the presumption of correctness, but only by clear and convincing
 15 evidence. Id.; see also 28 U.S.C. § 2254(e)(1). The facts as found by the state
 16 appellate court are as follows:

17 The crimes were committed as part of the familiar saga of cyclical violence
 18 between rival gangs. The TNS gang, to which Ojito (aka Mist) belonged
 19 and of which he was considered a leader, were rivals of the KN gang. All
 of the victims were associated with or connected to the KN gang.

20 **A. The March 2002 Murders**

21 On March 1, 2002, six TNS members, including Ojito, were gathered at
 22 Ojito's apartment. Around 4:00 p.m., a large group of young men affiliated
 with KN gathered near a bus stop outside Ojito's apartment building. They
 were looking towards Ojito's apartment complex and were throwing gang
 signs identifying themselves as KN members.

23 Ojito's group went outside to investigate the situation. As Ojito emerged
 24 from the driveway and stepped outside the security gate, someone from
 the KN group said, "There he is." Two members of the KN group, Larson
 25 Tufi and Jose Alegria, separated themselves from the group and took a
 few steps toward Ojito. One made a motion as if to indicate he had a gun
 26 in his waistband and Ojito responded by making the same sort of motion.

27 Tufi and Alegria began running toward Ojito. One of them started
 28 shooting at Ojito with a BB gun, and some of the BB's struck Ojito on his
 face and head. Ojito nevertheless ran toward them, and the two turned
 and began to flee. As the two fled, one of them fired over his shoulder at

1 the pursuing Ojito. As Ojito was chasing them, he fired numerous shots
2 with his .38 caliber handgun. One bullet struck Tufi in the back, killing
him. Another shot struck Alegria in the back, killing him.

3 Later that evening, Ojito told Jesus Morales, who was with Ojito during the
4 confrontation and was a TNS member, that one of the KN members had
pulled out a BB gun and shot at Ojito with BB's. He told Morales some of
5 the BB's had struck Ojito's back and face, and that Ojito had become
upset and shot toward the person holding the BB gun. Other than the BB
6 gun, Ojito did not mention seeing any other weapon.

7 Another person with Ojito at his apartment on the day of the confrontation,
Raul Estrada, stated the two groups had been trading derogatory remarks
8 with each other, and Estrada and two other TNS members had charged
toward the KN group, intending to fight them. A member of the KN group
9 pulled out a pellet gun and started shooting. Estrada then heard loud
gunshots and saw the pellet gun holder fall, and then Estrada heard
10 additional shots.

11 When Ojito was arrested in September 2002, he told police that he knew
one of the victims had shot at him with a BB gun. He also told police KN
12 members had engaged in various acts of vandalism at his home before
the shooting.

13 B. The Freeway Shooting

14 On September 10, 2002, Zet Martinez (a member of the KN gang who had
been near Tufi's body immediately after he was shot,) was attacked and
15 beaten by Ojito and another TNS member. Zet's mother arrived and tried
to stop the attack. Ojito eventually ceased the assault but, before leaving,
16 threatened Zet, stating he (Ojito) would "smoke [Zet's] ass like [he]
smoked [his] f----ing friends."

17 On September 13, Zet's older brother (Julio) asked Zet to get into Julio's
18 car to see if they could find the people who attacked Zet. Julio and Zet
were also accompanied by Zeat (Zet's twin brother) and a fourth person
19 (Andres Campos). On that day, Ojito was a passenger in a car being
driven by Morales. The other passengers in Morales's car were Fivol
20 (Ojito's brother), Marlen Gallardo, and Marcia Lucero.

21 When Morales's car neared 36th and Market, they saw "Chelli" (Ojito's
girlfriend) and pulled over. Chelli told them a group of KN members was
22 looking for Ojito. As they were talking Chelli saw the KN group in Julio's
car approaching their location, and pointed out the group to Ojito.

23 Julio spotted Ojito sitting in Morales's parked car. Julio pulled over and
24 stopped near Morales's car. Julio and Zeat (carrying a stick) got out and
began to approach Morales's car, challenging Ojito to a "one-on-one" fight.
25 Ojito stepped from the parked car, apparently wearing gloves and holding
a gun covered by a towel, which he was pointing at Julio, and began to
26 approach Julio. Julio and Zeat saw the gun and immediately ran back to
Julio's car, jumped in, and drove off as Ojito pursued on foot while pointing
27 the gun at Julio's car.

28 Ojito jumped back into Morales's car and, at Ojito's direction, they began
pursuing Julio's car onto the freeway. A car chase ensued, with

1 occupants throwing gang signs at each other. Ojito said "f--- it" and told
2 Morales to pull alongside Julio's car, saying, "Get them" numerous times.

3 Morales's car finally pulled even with Julio's car on the freeway but
4 remained separated from Julio's car by two empty lanes. Ojito told
5 Morales to pull next to Julio, but when Morales instead moved into Julio's
6 lane in front of Julio, Ojito said "what the f--- are you doing?" However,
7 Ojito (who had the gun in his hand) said he could lean out the window and
8 fire back at Julio's car. Julio's car was behind and moving closer to
9 Morales's car and made contact with Morales's rear bumper.² Julio's car
10 then pulled alongside Morales's car on the driver's side, away from Ojito,
11 and was less than a foot from Morales's car. Ojito reached across
12 Morales and fired a shot into Julio's car. The shot struck Zeat's face and
13 caused him substantial bodily harm.

14 After the first shot was fired, Julio's car pulled up ahead of Morales's
15 car and Julio's group began throwing objects out the window
16 towards Morales's car. Julio's car was moving toward the right lane
17 to leave the freeway, and as Morales's car passed by Julio's car,
18 Ojito fired several more shots at Julio's car from the front
19 passenger's side window. When Morales failed to follow, Ojito
20 expressed anger that Morales had not followed Julio.

21 After the freeway confrontation, Morales drove everyone back to the
22 motel room where he was staying. At the hotel room, Ojito made
23 telephone calls during which he said, "we got those faggots" and "we
24 got them Korn Nuts," derogatory terms used by TNS members to
25 refer to KN members. Ojito seemed happy and excited when he
26 made those statements. Later that day, Ojito told Morales he
27 wished Morales had followed Julio's car when it left the freeway so
28 Ojito "could finish it off."

29 C. Ojito's Statements to Police

30 On September 24, police arrested Ojito at the home of Jose
31 Rodriguez, another TNS member. Police found several items of
32 evidence at Rodriguez's home, including a handgun with a missing
33 firing pin (which Ojito admitted was his), and several albums with
34 photographs of Ojito posing with fellow gang members and guns.

35 During his interview with police, Ojito admitted he was the shooter at
36 the March 2002 killings and the September 2002 freeway shooting.
37 He stated that, just prior to the March 2002 shooting, the victims had
38 been laughing, "talking shit" and using disrespectful language
39 toward Ojito's gang, and he had shot them after one of the victims
40 shot at him first with a BB gun and had struck him several times.
41 Ojito said he got tired and mad at being shot with BB's, and fired two
42 shots that caused everyone to start running away. He fired again,
43 hitting one of the victims in the back as the victim was running away,
44 and shot the other victim in the back of the head.

45 D. The Disputed Evidence

46 Detective Rounds, testifying at Ojito's preliminary hearing, repeated
47 statements made by Marcia Lucero to Rounds about Ojito's conduct
48 and statements made during the freeway shooting. Ojito wrote a

1 letter to a friend, two weeks after his preliminary hearing, in which he
 2 expressed anger at Lucero and labeled her a "rat." Over Ojito's
 3 objection, the content of Lucero's statements to Rounds was
 4 admitted at trial as an "adoptive admission"

5 A gang expert testified generally about gang culture and mores, and
 6 about Ojito's and the victims' membership in the rival gangs. The
 7 court allowed this evidence, along with photographs showing Ojito
 8 with guns and other gang members, Ojito's handwritten rap lyrics,
 9 and evidence he possessed the inoperable gun. Ojito objected to
 10 much of this evidence. . . .

11 E. The Defense

12 Ojito did not testify. He asserted the prosecution evidence lacked
 13 credibility because of inconsistencies and because the witnesses
 14 received favorable treatment from the prosecution in exchange for
 15 their testimony. [He] argued the evidence showed he acted in self-
 16 defense in both incidents.

17 ² Morales later checked his rear bumper and saw a
 18 dent and chipped paint that had not been there prior to
 19 the incident. However, Morales was arrested a week
 20 after the freeway incident, and police photographs of
 21 the rear bumper showed no damage. Police found five
 22 shell casings near the freeway exit ramp where
 23 Morales's car ultimately broke away from Julio's car, and
 24 police found that several bullets had struck Julio's car.

25 (Lodgment No. 4 at 2-7.)

26 **III. Procedural Background**

27 On December 2, 2003, the District Attorney for the County of San Diego
 28 filed an Amended Consolidated Information charging Petitioner with two counts of
 murder, four counts of premeditated attempted murder, one count of mayhem,
 four counts of assault with a semi-automatic firearm, and one count of shooting
 into an occupied vehicle. (CT at 11-17.) On January 15, 2004, a jury found
 Petitioner guilty on the murder, attempted murder, mayhem, and shooting into an
 occupied vehicle charges. (CT at 626-29.)

Petitioner appealed to the California Court of Appeal, Fourth Appellate
 District, Division One ("California Court of Appeal"). (Lodgment Nos. 1-3.) On
 August 18, 2008, in an unpublished opinion, the California Court of Appeal
 affirmed the convictions on the murder charges and reversed the convictions on

1 the other charges. (Lodgment No. 4.) Petitioner then filed a Petition for Review in
 2 the California Supreme Court (see Lodgment No. 6), which was denied without
 3 comment on November 17, 2008 (Lodgment No. 7).

4 On September 28, 2009, Petitioner filed a Petition for Writ of Habeas
 5 Corpus pursuant to 28 U.S.C. § 2254 in this Court. (Doc. No. 1.) Respondent
 6 filed an Answer on January 29, 2010, and Petitioner filed a Traverse on April 5,
 7 2010. (Doc. Nos. 14, 17.)

8 **IV. Discussion**

9 **A. Standard of Review**

10 Title 28, United States Code, § 2254(a) sets forth the following scope of
 11 review for federal habeas corpus claims:

12 The Supreme Court, a Justice thereof, a circuit judge, or a
 13 district court shall entertain an application for a writ of habeas
 14 corpus in behalf of a person in custody pursuant to the judgment of
 a State court only on the ground that he is in custody in violation of
 the Constitution or laws or treaties of the United States.

15 28 U.S.C. § 2254(a).

16 The current Petition is governed by the Antiterrorism and Effective Death
 17 Penalty Act of 1996 ("AEDPA"). See Lindh v. Murphy, 521 U.S. 320 (1997). As
 18 amended, 28 U.S.C. § 2254(d) reads:

19 (d) An application for a writ of habeas corpus on behalf of a
 20 person in custody pursuant to the judgment of a State court shall not
 21 be granted with respect to any claim that was adjudicated on the
 merits in State court proceedings unless the adjudication of the
 claim --

22 (1) resulted in a decision that was contrary to, or
 23 involved an unreasonable application of, clearly
 established Federal law, as determined by the
 Supreme Court of the United States; or

24 (2) resulted in a decision that was based on an
 25 unreasonable determination of the facts in light of the
 26 evidence presented in the State court proceeding.

27 28 U.S.C. § 2254(d)(1)-(2). "A state court's determination that a claim lacks merit
 28 precludes federal habeas relief so long as 'fairminded jurists could disagree' on

the correctness of the state court's decision." Harrington v. Richter, 131 S. Ct. 770, 786 (2011) (citing Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)). As amended by AEDPA, § 2254(d) permits habeas relief only "where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with [the Supreme] Court's precedents." Id. at 786. "[A] state prisoner must show that the state court's ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Id. at 786-87.

Where there is no reasoned decision from the state's highest court, the Court "looks through" to the underlying appellate court decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991). If the dispositive state court order does not "furnish a basis for its reasoning," federal habeas courts must conduct an independent review of the record to determine whether the state court's decision is contrary to, or an unreasonable application of, clearly established Supreme Court law. See Delgado v. Lewis, 223 F.3d 976, 981-82 (9th Cir. 2000) (overruled on other grounds by Lockyer, 538 U.S. at 75-76); Himes v. Thompson, 336 F.3d 848, 853 (9th Cir. 2003). However, a state court need not cite Supreme Court precedent when resolving a habeas corpus claim. Early v. Packer, 537 U.S. 3, 8 (2002). "[S]o long as neither the reasoning nor the result of the state-court decision contradicts [Supreme Court precedent]," the state court decision will not be "contrary to" clearly established federal law. Id.

B. The Admission of the Contested Evidence at Trial Did Not Violate Petitioner's Right to Due Process

In the single ground for relief raised in his Petition, Petitioner contends that the trial court violated his right to due process by admitting into evidence (1) photographs of Petitioner brandishing firearms, (2) evidence that Petitioner possessed an inoperable firearm at the time he was arrested, (3) rap lyrics written by Petitioner, and (4) gang evidence. (Pet. at 6.) Petitioner asserts that the

1 cumulative impact of this evidence deprived him of his Fourteenth Amendment
2 right to a fundamentally fair trial. (Id.)

3 Respondent argues that Petitioner's challenges to the trial court's
4 evidentiary rulings do not warrant federal habeas relief as they involve issues of
5 state law. (Resp't Mem. at 5-6.) Respondent further contends that to the extent
6 Petitioner alleges the admission of the evidence violated his due process rights,
7 the California Court of Appeal's rejection of Petitioner's claim was neither contrary
8 to nor an unreasonable application of clearly established federal law. (Id.)

9 **1. The Photographs**

10 Petitioner argues that the photographs admitted into evidence of Petitioner
11 brandishing firearms were "in no way similar to the circumstances of the charged
12 crimes, and so were not probative of intent, but were instead impermissible
13 'proclivity' evidence." (Pet. at 6.)

14 In denying Petitioner's claim, the California Court of Appeal stated:

15 The prosecution sought to introduce numerous photographs
16 showing Ojito brandishing guns while posing with fellow gang
17 members. The prosecutor asserted the photographs were relevant
18 (1) to show Ojito had access to guns, (2) to show how Ojito's gang
19 had evolved from a tagging crew to a criminal gang, and (3) as
20 circumstantial evidence bearing on Ojito's intent at the time of the
21 shootings. The defense objected that the photographs were
22 irrelevant to showing Ojito's intent in rebuttal of his claim of . . . self
23 defense, the evidence was unduly prejudicial under section 352 [of
24 the California Evidence Code], and there was no foundational
25 showing that the photographs were taken near the time of the
26 shootings. The court ruled that, although the photographs were
27 cumulative as to the first theory of relevance (because Ojito
28 admitted having access to the guns he used) and the second theory
(i.e. the gang's evolutionary history) was tangential to any disputed
issue in the case, the issue of Ojito's intent was the core disputed
issue. The court concluded that, because the jury would be required
to decide whether Ojito shot the victims in self-defense or whether
he killed them because he harbored animosity toward KN members
and believed violence was a commendable quality, photographs
showing Ojito coupled gang affiliation with glorification of violence
was relevant circumstantial evidence that could tend to show his
intent was retribution toward a rival gang.

We conclude the trial court did not abuse its discretion in concluding
the evidence was relevant and not unduly prejudicial. Evidence
showing Ojito closely associated his gang membership with being
armed with firearms has some tendency in reason to show that

1 affronts to his gang provided motivation for Ojito to engage in violent
 2 retaliation, regardless of whether the threats from the other gang
 3 were de minimus or had ceased, and therefore it was not an abuse
 4 of discretion to determine the photographs were relevant to a
 5 disputed issue. Moreover, because Ojito had already told police
 6 (and the evidence was undisputed) that he was a gang member and
 7 was armed when he confronted KN members outside of his
 8 apartment, it was not an abuse of discretion to conclude that
 9 photographs showing his gang affiliation and possession of
 10 weapons was not so unduly inflammatory that their prejudicial effect
 11 outweighed their probative value under section 352.

12 Ojito asserts the evidence was inadmissible under Evidence Code
 13 section 1101 as prior bad acts evidence. Ojito did not interpose this
 14 objection at trial, and the issue is thus not preserved for appeal.
 15 However, even assuming the issue was preserved, the trial court
 16 noted the evidence was not being offered as character evidence, but
 17 was instead being offered on issues of intent and motive, both of
 18 which are acceptable exceptions under Evidence Code section
 19 1101, subdivision (b), to support the admission of the photographs.

20 (Lodgment No. 4 at 20-22.)

21 The admission of evidence is an issue of state law. Holley v. Yarborough,
 22 568 F.3d 1091, 1101 (9th Cir. 2009). "Simple errors of state law do not warrant
 23 federal habeas relief." Id. (citing Estelle v. McGuire, 502 U.S. 62, 67 (1991)).

24 According to the Ninth Circuit,

25 We are not a state supreme court of errors; we do not review
 26 questions of state evidence law. On federal habeas we may only
 27 consider whether the petitioner's conviction violated constitutional
 28 norms. . . . We therefore consider whether the admission of the
 29 evidence so fatally infected the proceedings as to render them
 30 fundamentally unfair.

31 Jammal v. Van De Kamp, 926 F.2d 918, 919 (9th Cir. 1991) (citations omitted).

32 "A habeas petitioner bears a heavy burden in showing a due process
 33 violation based on an evidentiary decision." Boyde v. Brown, 404 F.3d 1159,
 34 1172 (9th Cir. 2005). The Supreme Court has "defined the category of infractions
 35 that violate 'fundamental fairness' very narrowly." Dowling v. United States, 493
 36 U.S. 342, 352 (1990). "Under AEDPA, even clearly erroneous admissions of
 37 evidence that render a trial fundamentally unfair may not permit the grant of
 38 federal habeas corpus relief if not forbidden by 'clearly established Federal law,'

1 as laid out by the Supreme Court.” Holley, 568 F.3d at 1101. There is no clearly
 2 established Federal law, as determined by the U.S. Supreme Court, on the issue
 3 of whether “admission of irrelevant or overtly prejudicial evidence constitutes a
 4 due process violation.” Id. Thus, it cannot be said that the California Court of
 5 Appeal’s rejection of this claim was contrary to or an unreasonable application of
 6 clearly established federal law.

7 Additionally, pursuant to Jammal, “[o]nly if there are *no* permissible
 8 inferences the jury may draw from the evidence can its admission violate due
 9 process.” Jammal, 926 F.2d at 920. Here, as the California Court of Appeal
 10 explained, the photographs in this case helped the jury determine whether
 11 Petitioner acted in self-defense or in retribution toward a rival gang when he shot
 12 Larson Tufi and Jose Alegria. (Lodgment No. 4 at 21-22.) The jury could draw
 13 from the photographs inferences about Petitioner’s affiliation with a criminal street
 14 gang and further infer from such affiliation that Petitioner might act violently
 15 towards members of rival gangs; this tends to show a motive for the shooting
 16 other than self-defense. No established Supreme Court precedent renders such
 17 inferences impermissible. Holley, 568 F.3d at 1101. Because it is not the case
 18 that there were *no* permissible inferences the jury could draw from the
 19 photographic evidence (see Jammal, 926 F.2d at 920), admission of this evidence
 20 did not violate due process.

21 **2. The Inoperable Firearm**

22 Petitioner argues that the “evidence of the inoperable firearm was
 23 inadmissible character evidence” and that there was no evidence that the gun
 24 “was linked to the incidents giving rise to this case.” (Pet. at 6; Traverse at 4.)

25 The California Court of Appeal, in disposing of Petitioner’s claim
 26 concerning the inoperable firearm, stated:

27 The [trial] court rejected the defense argument that the inoperable
 28 firearm should be excluded because it only showed [Ojito’s]
 character for possessing guns and was therefore inadmissible
 character evidence under Evidence Code section 1101, subdivision

(a). Instead, the trial court concluded the inoperable gun was circumstantial evidence of Ojito's intent at the time of the shootings because it buttressed the inference that Ojito, by frequently arming himself with weapons and acquiring weapons that could be available for future use,⁸ showed he was willing to engage in confrontations knowing he had firepower at his disposal to use in such confrontations.

Ojito asserts that when the prosecution proves a specific gun was used in the crime, it may be error to admit evidence of other weapons found in the defendant's possession where its purpose is "to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." [Citation omitted.] Here, however, Ojito admitted to being the shooter in both shootings, and the inoperable firearm was not admitted to show Ojito was likely to have been carrying a weapon, but was instead to show Ojito entered these confrontations carrying tools to accomplish his intended goals. Because the evidence was relevant to Ojito's intent and motive, it was admissible under Evidence Code section 1101, subdivision (b).

⁸ Although the weapon was inoperable, the evidence permitted the conclusion that Ojito acquired [the] firearm believing it worked and, even after learning it was missing the firing pin, he kept it expecting he could repair it to make it operable.

(Lodgment No. 4 at 22-23.)

As noted above, it is not the province of a federal habeas court to review state court determinations on questions of state law. See Estelle, 502 U.S. at 67-68. Again though, if the admission of the inoperable gun evidence was so fundamentally unfair as to result in a denial of due process, relief may be granted on that basis. Estelle, 502 U.S. at 72. Only if there are no permissible inferences that the jury may draw from the evidence can its admission rise to the level of a due process violation. Jammal, 926 F.2d at 920. Here, as the state appellate court determined, there were rational inferences, not constitutionally impermissible, that the jury could draw from the evidence of the inoperable gun evidence; namely, that the evidence tended to show Ojito entered confrontations carrying weapons for use in the confrontations. It is of no matter that the inoperable firearm was not the one used in the shootings at issue; evidence is relevant if it tends to make any fact relevant to the elements of the crime more or less probable. McKinney v. Rees, 993 F.2d 1378, 1382 (9th Cir. 1993). Because it is not the case that

1 there were *no* permissible inferences the jury could draw from the inoperable gun
 2 evidence (see Jammal, 926 F.2d at 920), admission of evidence relating to the gun did
 3 not violate due process.

4 **3. The Rap Lyrics**

5 Petitioner argues that “[t]he lyrics were inflammatory, and not sufficiently
 6 probative of [his] intent at the time of the crimes.” (Pet. at 6.) Respondent contends
 7 that the lyric evidence was relevant to prove a key part of the prosecution’s theory of the
 8 case: “*why* Ojito would have shot and killed the victims over being shot at by BB’s.”
 9 (Resp’t Mem. at 11.)

10 In regard to the propriety of the admission of this evidence, the California Court
 11 of Appeal stated:

12 Ojito asserts the admission into evidence of rap lyrics he composed
 13 approximately a year after the shootings was an abuse of discretion. The
 14 lyrics were amenable to the interpretation that Ojito glorified violence,
 15 harbored animosity toward KN members (and specifically Jose Alegria,
 16 one of the murder victims), and was content with his violence toward KN
 17 members.⁹ The prosecution asserted the lyrics showed Ojito harbored
 18 animosity toward KN members, and was manifesting a willingness to
 19 violently act toward KN members, and this was relevant to his intent when
 20 he confronted them during the two shootings. The defense objected that
 21 the lyrics were irrelevant to Ojito’s intent (because the lyrics were written
 22 long after the shootings), and any probative value was outweighed by its
 23 prejudicial impact. The court ruled the evidence was relevant to showing
 Ojito’s intent, and that its probative value outweighed its prejudicial impact.

19 The trial court correctly ruled that Ojito’s state of mind and attitude after
 20 the crime, by expressing continued pride in and approval of killing enemy
 21 gang members rather than regret, was relevant to negate his claim that
 22 the killings were not the unfortunate result of necessary self-defense but
 23 were instead the result of Ojito’s animosity toward KN members. [Citation
 omitted.] Although the temporal separation between the events and the
 lyrics provided the defense an opportunity to argue they should be
 discounted, that argument goes to the weight rather than the relevance
 and was a question for the jury.

24 Moreover, we cannot conclude the trial court abused its discretion when it
 25 rejected the defense’s section 352 objection. The trial court carefully
 26 considered whether the danger of undue prejudice outweighed the
 27 probative value of the evidence. The court noted the core issue in the
 28 case was Ojito’s motive, stating the central dispute was whether he “[w]as
 . . . somebody who reasonably feared for his life or feared he was facing
 great bodily injury, or was [he] somebody who was in another beef with
 these people and wanted to kill them and did his best to do so?” and
 “that’s in fact the very relevance for which [the lyrics] are offered. It’s not
 like the glorification of violence is a . . . side trip What the People are

1 trying to get across [is] that this wasn't self-defense, this is someone who
2 wanted to commit acts of violence and had an occasion to do so."

3 The undue prejudice section 352 is designed to preempt is the harm from
4 evidence that, by its unique nature, has very little effect on the issues
5 while simultaneously tending to evoke an emotional bias against the
6 defendant as an individual. Section 352 addresses ""not the prejudice or
7 damage to a defense that naturally flows from relevant, highly probative
8 evidence." [Citations.] "Rather, the statute uses the word in its
9 etymological sense of 'prejudging' a person or cause on the basis of
10 extraneous factors. [Citation.]" [Citation.] [Citation.] In other words,
11 evidence should be excluded as unduly prejudicial *when it is of such*
12 *nature as to inflame the emotions of the jury, motivating them to use the*
13 *information, not to logically evaluate the point upon which it is relevant, but*
14 *to reward or punish one side because of the jurors' emotional reaction.* In
15 such a circumstance, the evidence is unduly prejudicial because of the
16 substantial likelihood the jury will use it for an illegitimate purpose." (*Vorse*
17 *v. Sarasy* (1997) 53 Cal. App. 4th 998, 1009.) The evidence was offered
18 for a legitimate purpose (to show Ojito approved of group violence toward
19 KN members) to assist on the pivotal issue--*why* Ojito inflicted violence on
20 KN members during the shootings. We conclude it was not a clear abuse
21 of discretion for the court to reject Ojito's section 352 objection.

22 ⁹ The lyrics included the phrases "all you x faggots is
23 jealous, pull your gun out and blast. I dare you x faggots to
24 open fire, I'll murder that ass & disappear before the cops
25 come running. My Glocks spittin rounds fags dropping down
26 clutchin they stomach. Its southwest TNS" The term
27 "faggots" was a derogatory appellation for KN members, and
28 the lyrics also . . . contained the crossed-out word "vicious,"
the gang nickname for Alegria.

(Lodgment No. 4 at 24.)

18 Again, the admissibility of evidence is a matter of state law, and is not reviewable
19 in this proceeding. See Estelle, 502 U.S. at 67. But, if the admission of the lyrics
20 evidence was so fundamentally unfair as to result in a denial of due process, relief may
21 be granted on that basis. Id. at 72. Only if there are no permissible inferences that the
22 jury may draw from the evidence can its admission rise to the level of such a due
23 process violation. Jammal, 926 F.2d at 920. Here, the lyrics evidence was admitted
24 because the jury could draw a permissible inference about Petitioner's hostility toward
25 other gangs, and specifically the gang of which the shooting victims were a part. This
26 inference directly related to Petitioner's intent as it pertained to his claim of self defense;
27 if Petitioner could be shown to have a hostility toward KN gang members, it would make
28 his claim of self-defense less credible. Because the lyrics evidence was probative of

Petitioner's intent, the jury could have drawn a permissible inference from the evidence. Therefore, the admission of the lyrics evidence did not violate Petitioner's right to due process.

4. Expert Gang Testimony

Petitioner argues that the admission of expert gang testimony was irrelevant, cumulative, and inflammatory, and that "rather than proving a matter at issue in this case, it was designed to show appellant should be convicted because he was the leader of a violent and dangerous criminal street gang." (Pet. at 6; Traverse at 5-6.)

The California Court of Appeal dispensed with Petitioner's assertion that admission of certain gang testimony was improper as follows:

Ojito finally asserts the trial court erroneously permitted an expert to testify concerning gangs. Ojito asserts the evidence was irrelevant and inflammatory, and the erroneous admission was prejudicial. However, Ojito concedes on appeal that some of the gang evidence was relevant to the disputed issues: it was relevant to the issue of motive insofar as the evidence showed the shootings occurred in the context of a gang rivalry in which Ojito and the victims were members of competing gangs, and was also relevant to interpreting the evidence (e.g. the "crossing out" of names, and of gang attitudes towards rats and snitches) the jury was to consider.

The only evidence Ojito on appeal asserts was evidence that should not have been admitted at all¹¹ was the expert's discussion of (1) whether TNS and KN met the criteria for a criminal street gang, and (2) the evolution of TNS from a "tagging crew" to a criminal street gang. However, the evidence described by Ojito was a minor component of the expert's testimony, and was largely provided as a foundation for the expert's knowledge and expertise as to the TNS and KN gangs and as a backdrop against which the expert could more particularly describe his opinions on the more central issues in the case on which Ojito concedes his opinions were relevant.¹¹ We are convinced the trial court correctly permitted the expert to generally and briefly discuss the nature of street gangs and his particularized knowledge of the history of TNS and KN for foundational purposes. Moreover, even if that evidence should have been excluded, it is not reasonably probable Ojito would have obtained a more favorable result even if the expert's testimony could have been sanitized to remove all references to TNS's evolution and whether TNS was a criminal street gang.

¹¹ The expert's direct testimony consisted of 41 pages of reporter's transcript, and the cross-examination covered another 20 pages, but the testimony devoted to the complained-of evidence totaled less than six pages of the expert's direct testimony, and much of that testimony was foundational for the expert's opinion that TNS and KN were rival gangs and Ojito was a documented member of TNS.

1 (Lodgment No. 4 at 25-28.)

2 This Court cannot review the admission of the gang expert's testimony for error
3 on state law grounds. See Estelle, 502 U.S. at 67-68. For Petitioner to be granted relief
4 based on the admission of the gang expert's testimony, the admission of the testimony
5 must have been so fundamentally unfair as to have resulted in a denial of due process.
6 Estelle, 502 U.S. at 72. Once again, if a jury could have made any permissible
7 inference based on the gang expert's testimony, the admission of that testimony cannot
8 be considered a violation of due process. Jammal, 926 F.2d at 920.

9 The gang evidence was provided to the jury in the testimony of Detective Ernest
10 Encinas during direct examination by the prosecutor. (Lodgment No. 9, Reporter's
11 Transcript ("RT") at 3783-824.) Detective Encinas testified that he had extensive
12 experience investigating and interacting with gangs. (Id. at 3783-88.) He testified that
13 he was familiar with TNS and that Petitioner was known as "Mist" within TNS. (Id. at
14 3788-89.) He gave testimony that there are gang "territories." (Id. at 3794.) He defined
15 "criminal street gang" as "a group of three or more individuals who associate on a
16 regular basis; who have a name; claim a turf or territory; who contribute to the
17 deterioration of a neighborhood; and more important, is their involvement in criminal
18 activity." (Id.) He said he knew of TNS, and had first heard of TNS while investigating
19 the March 1, 2002 murders (known as the "5000 Logan Incident"), had investigated
20 other crimes allegedly committed by TNS members, and had spoken to people who
21 claimed to be members of TNS. (Id.) He said that TNS members had told him that they
22 claimed Southeast San Diego as their territory. (Id. at 3795.) He was aware that TNS
23 members had been implicated in murder, robbery, car-jackings, break-ins of schools,
24 weapons violations, graffiti, and witness intimidation. (Id.) The detective testified that
25 TNS had evolved from a "tagging crew" into a violent street gang. (Id. at 3796.) He
26 said that the gangs UF and KN were aligned, and that KN members "graduate" to UF.
27 (Id. at 3798.) He said UF and KN were enemies of TNS and that UF and KN also claim
28 "Southeast" as their territory. (Id. at 3799-800.) He testified that UF and KN were

1 violent street gangs. (Id. at 3800-02.) He identified tattoos belonging to Petitioner and
2 a hat Petitioner wore in a picture as affiliating Petitioner with TNS. (Id. at 3806, 08.)
3 The detective then interpreted the photographs discussed above as to what they
4 indicated concerning the gang affiliation of the subjects and which types of weapons
5 were depicted. (Id. at 3811-19.) He testified that gang members increase their status
6 within a gang through violent and criminal acts. (Id. at 3819-20.) He detailed the
7 process police use to document gang membership of individuals. (Id. at 3821-23.)
8 Finally, Detective Encinas testified that Petitioner was a documented gang member and
9 that Petitioner had admitted his gang affiliation to the detective in an interview. (Id. at
10 3824.)

11 The thrust of the gang expert's testimony was to establish that Petitioner was a
12 member of a criminal street gang and that the victims' gang was the enemy of
13 Petitioner's gang. The testimony brought this point across clearly, but not without a
14 substantial amount of foundation laid for his opinion. In order for the expert to express
15 his opinion that Petitioner was in a gang and that the victims were enemies of that gang,
16 the expert had to explain the background of those gangs, the reasons for the expert's
17 knowledge about the gangs, the indications that a person was a member of a gang, why
18 gangs in general might be violent toward one another, and why these particular gangs
19 were violent toward one another. At each step of the gang expert's testimony, the jury,
20 by the prosecutor's design, could draw a further inference about Petitioner's intent and
21 motive in shooting the victims. The jury could draw a permissible inference about
22 Petitioner's intent and motive in shooting the victims; the gang expert's testimony made
23 Petitioner's claim of self defense less credible. See, e.g., U.S. v. Santiago, 46 F.3d 885,
24 889 (9th Cir. 1995) (finding gang evidence relevant to motive).

25 Because the gang evidence led the jury to a permissible inference, the admission
26 of the evidence did not violate Petitioner's right to due process of law. Estelle, 502 U.S.
27 at 72; Jammal, 926 F.2d at 920.

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1 **5. The Cumulative Effect of the Disputed Evidence on Petitioner's**
 2 **Right to Due Process**

3 Petitioner claims that the cumulative effect of the admission of all of the evidence
 4 discussed above amounted to a denial of his right to due process. (Pet. at 6.) None of
 5 the contested evidence gives rise to a ground for federal habeas relief because a jury
 6 could make a permissible inference based on each piece of evidence discussed. See
 7 Jammal, 926 F.2d at 920. Because Petitioner has not demonstrated any single
 8 constitutional error in this case, "there is nothing to accumulate to a level of a
 9 constitutional violation." Mancuso v. Olivarez, 292 F.2d 939, 957 (9th Cir. 2002). The
 10 California Court of Appeal's rejection of Petitioner's arguments regarding the contested
 11 evidence was neither contrary to nor an unreasonable application of clearly established
 12 federal law. Accordingly, the Court recommends that the Petition be denied.

13 **V. Conclusion and Recommendation**

14 After a thorough review of the record in this matter, the undersigned magistrate
 15 judge finds that Petitioner has not shown that he is entitled to federal habeas relief
 16 under the applicable legal standards. Therefore, the undersigned magistrate judge
 17 hereby recommends that the Petition be **DENIED WITH PREJUDICE** and that judgment
 18 be entered accordingly.


19 This Report and Recommendation is submitted to the Honorable Larry A. Burns,
 20 United States District Judge assigned to this case, pursuant to the provisions of 28
 21 U.S.C. § 636(b)(1). **IT IS ORDERED** that not later than **March 25, 2011**, any party may
 22 file written objections with the Court and serve a copy on all parties. The document
 23 should be captioned "Objections to Report and Recommendation." **IT IS FURTHER**
 24 **ORDERED** that any reply to the objections shall be served and filed not later than **April**
 25 **4, 2011**. The parties are advised that failure to file objections within the specified time
 26 may waive the right to raise those objections on appeal of the Court's order. See
 27 Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998); Martinez v. Ylst, 951 F.2d 1153

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1 (9th Cir. 1991).

2 **IT IS SO ORDERED.**

3 DATED: March 2, 2011

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5 Jan M. Adler
6 U.S. Magistrate Judge
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